

# Enforcing Institutional Controls at Federal Facilities

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# Federal agency resistance to IC's

- Primary issue is federal agency refusal to create “property right LUCs” on federal installations
- Generally, position justified on basis that only General Services Administration can dispose of surplus federal property

# Federal agencies' legal arguments opposing state IC laws

- State IC laws are not within RCRA waiver
  - Not a requirement re control/abatement of solid/hazardous waste
  - Discriminates against federal agencies
- Property Clause of U.S. Constitution prohibits application of state IC laws to US
- Under Property Act, only GSA may dispose property interests
  - GSA opposes state IC laws
- CERCLA § 120 pre-empts state IC laws

# GSA policy on ICs

- GSA views IC's as “disposals of real property”
- Property Act: GSA has exclusive management of federal property disposal, absent specific statutory authority (e.g., BRAC); GSA may delegate within limits
- For excess property, GSA will evaluate proposed restrictions during disposal process re impact on: disposition; price, highest and best use, legal requirement, enforceability

# GSA policy, cont'd.

- GSA policy re property expected to remain in federal ownership:
  - Doubtful as to “necessity, desirability, or legal enforceability”
  - Who would enforce? How?
  - Difficult for GSA to evaluate impact on eventual disposal
- GSA will deny all requests for ICs on federal property unless “unique and extreme” circumstances shown

# Are IC's within scope of RCRA waiver?

- Clearly are requirements “respecting the control and abatement of solid waste or hazardous waste disposal and management”
  - IC requirement may be codified as part of state’s hazardous waste law
  - IC’s considered “response actions” under CERCLA
    - NCP & preamble & EPA guidance recognize IC’s usually implemented under state law
  - Required in many CERCLA consent decrees at private sites

# Are IC's within scope of RCRA waiver?

- Do IC's discriminate against federal agencies?
  - Requirement applies in same manner to federal agencies as to other parties
    - Unrestricted use cleanup: no covenant
    - Restricted use cleanup: covenant required
    - Note federal arguments re narrow interpretation of “requirement”

# What about the Property Clause?

- Any limitations imposed by Property Clause are overridden by the waivers of immunity in RCRA and CERCLA
  - *Hancock v. Train*, 426 U.S. 167



# What about GSA and the Property Act?

- GSA subject to waivers of immunity
- GSA may (and has) delegated some authority to dispose surplus property to other federal agencies
- If IC's are interests in property, the restrictions in them are surplus, and must be disposed under Property Act

# OK, what about CERCLA § 120(h)?

- CERCLA § 120(h) does not preempt state IC laws
  - 42 USC §§ 9614(a), 9652(d) explicitly preserve state laws regarding releases of hazardous substances
  - § 120(h) does not create an IC
  - § 120(h) requires federal agencies to warrant they have imposed IC's when IC's are relied on in a CERCLA decision
    - Thus, may require compliance with state IC law